No. 9

In the Supreme Court of the United States

OCTOBER TERM, 1950

BERNICE B. FERES, AS EXECUTRIX UNDER THE LAST WILL AND TESTAMENT OF RUDOLPH J. FERES, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the district court (R. 2-3) is not reported. The opinion of the United States Court of Appeals for the Second Circuit (R. 8-12) is reported at 177 F. 2d 535.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 1949 (R. 12). The petition for a writ of certiorari was filed on January 26, 1950 and

granted on March 13 (R. 13). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether damages may be recovered under the Federal Tort Claims Act by the dependents of a member of the armed forces for his death which was incident to his military service, and occurred as a result of the alleged negligence of other military personnel.

STATUTE INVOLVED

Sections 1346(b), 1402(b), 2674, and 2680 of Title 28, United States Code [formerly the provisions of the Federal Tort Claims Act], are set forth in the Appendix to the Brief for the United States in *United States* v. *Griggs*, No. 31, this Term.

STATEMENT

Petitioner's claim for damages under the Federal Tort Claims Act is based on the allegedly wrongful death of her husband. Her complaint alleged that on December 20, 1947, her husband, an Army lieutenant, "while on active duty in service of the United States, was killed by fire in a barracks in Pine Camp, New York, a military post or station of the United States, to which barracks [he] had been assigned and required to be quartered in by his superior officers" (R. 4).

The complaint alleged negligence on the part of those superior officers who required the deceased officer to be quartered in barracks which they knew or should have known "was unsafe due to a defec-

tive heating plant" (R. 4). Further negligence was also alleged on the part of the fireguard, assigned to the area in which the fire occurred, and on the part of the fireguard's supervisors (R. 4).

The district court sustained the motion of the United States to dismiss the complaint, ruling that the Federal Tort Claims Act does not authorize a recovery for damages for the death of an Army officer who was killed incident to his service as a result of the negligence of other Army personnel (R. 2-3). The Court of Appeals for the Second Circuit affirmed (R. 8-12).

ARGUMENT

This case, in common with *United States* v. *Griggs* and *Jefferson* v. *United States* (Nos. 31 and 29, this Term), raises the question as to whether Congress intended the Federal Tort Claims Act to cover claims for the death or injury of a soldier, sustained incident to his military service and as a result of the negligence of other military personnel. The brief for the United States in the *Griggs* case, No. 31, develops the reasons and authorities which we submit establish the correctness of the decision below in the instant case. Accordingly, we are undertaking here only to deal briefly with certain special contentions advanced by the petitioner.

1. Petitioner's argument that the death in the instant case was not incident to Lt. Feres' military service is without merit. First, it must be noted that this argument is a complete reversal of the po-

sition taken by petitioner in the court below. There, petitioner, in acknowledging the service-incident nature of her husband's death, stated the question on appeal to be whether "a soldier or his estate can sue the United States under the Tort Claims Act for a tort committed upon him by an agent of the United States, which tort was incident to his service."[1] Second, the facts alleged by petitioner in her complaint confirm the fact that Lt. Feres' death was incident to his military service. That complaint shows that he was in the military barracks where he burned to death only because, as petitioner herself emphasized, his superior officers "assigned and required [him] to be quartered" there (R. 4). Since his military obligations compelled him to maintain his quarters in those barracks, there can be no doubt that the instant claim for damages based on alleged negligence on the part of the superior officers in requiring him to be quartered there is a claim arising out of a service-incident death.

2. Petitioner, while recognizing the need for prohibiting *injured* soldiers from suing "as a matter of discipline",[2] contends, however, that a different rule should apply to dependents of soldiers who have been killed in service. But it is obvious that the identical considerations of impairment of military

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[1] Brief filed by petitioner in the court below (No. 61, Court of Appeals for the Second Circuit), at page 2.

[2] Petition for Writ of Certiorari, p. 20.

discipline as a result of judicial review of military action, with the consequent shift to civilian courts of the military's traditional right of self-regulation, apply with equal force to death, as well as to injury, situations. See brief for the United States in the *Griggs* case, pp. 21-28. Moreover, the need for applying the same rule to both types of cases is manifested by *Dobson* v. *United States,* 27 F. 2d 807 (C.A. 2), certiorari denied, 278 U. S. 653, and *Bradey* v. *United States,* 151 F. 2d 742 (C.A. 2), certiorari denied, 326 U. S. 795, rehearing denied, 328 U. S. 880—both of which, like the instant case, were death cases. Accord: *Goldstein* v. *New York,* 281 N.Y. 396, where the dependents of a serviceman, who was killed in the line of duty as a result of the negligence of another serviceman, were also denied recovery.[3]

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[3] *Green* v. *New York,* 278 N.Y. 15 and *Bamman* v. *Erickson,* 259 App. Div. 1040, relied on in the Petition for Writ of Certiorari, p. 21, have no application here. Those cases are concerned with a New York statutory suspension of a convict's civil rights during his term of sentence. The *Green* case merely applied this statute in prohibiting an inmate from suing the State on a negligence claim. And, in the *Bamman* case, the statute was held not to preclude a convict from assigning to his victims the right to recover a wager deposit, in circumstances where the convict retained no beneficial interest in the cause of action.

CONCLUSION

For the reasons set forth above and in the Brief for the United States in the *Griggs* case, No. 31, it is respectfully submitted that the judgment of the court below should be affirmed.

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